ESTATE OF WILMA FLORENCE FIRST YOUNGMAN

IBIA 81-42 Decided June 4, 1982

Appeal from a March 17, 1981, order by Administrative Law Judge Alexander H. Wilson reopening estate and modifying inheritance decision. (Probate 1711-57.)

Affirmed in part, reversed and remanded in part.

1. Indian Probate: Appeal: Dismissal

   Under 43 CFR 4.320 (1981), service of a copy of a notice of appeal on all interested parties is not a jurisdictional requirement, and an appeal will not be dismissed for failure of service when interested parties have received actual notice of the pendency of the appeal.

2. Indian Probate: Reopening: Generally

   When reopening is denied by the Administrative Law Judge, a person seeking reopening should offer the evidence that would be presented at an evidentiary hearing to the Board of Indian Appeals which shall then decide, based upon that evidence, whether a sufficient showing was made to mandate reopening.

3. Indian Probate: Reopening: Generally

Reopening is granted for the purpose of preventing a miscarriage of justice based upon a showing that the evidence presented at the original hearing was incorrect, incomplete, or otherwise inadequate.

APPEARANCES: Steven R. Marks, Esq., Glasgow, Montana, for appellant Patricia First McBride; Warren C. Youngman, pro se. Counsel to the Board: Kathryn A. Lynn.

MEMORANDUM OPINION AND ORDER BY ADMINISTRATIVE JUDGE ARNESS

On March 17, 1981, an order to reopen and to modify a January 31, 1957, order was issued in the estate of Wilma Florence First Youngman, Fort Peck Allottee No. 3879 (decedent). The March 17, 1981, order found that Patricia First McBride (appellant) was the daughter of decedent and was entitled to share in her estate. The order specifically denied reopening the question whether Warren C. Youngman (appellee) was decedent's surviving spouse.

On April 27, 1981, appellant filed a letter notice of appeal with Administrative Law Judge Keith L. Burrowes. 1/ On May 13, 1981, counsel for

1/ This case, with others at the Fort Peck Agency, was temporarily transferred to Judge Burrowes following Judge Wilson's retirement. The case was eventually assigned permanently to Administrative Law Judge Daniel S. Boos. Appellee alleges that these reassignments were to his detriment. This contention is without merit.

The notice of appeal was filed with the Administrative Law Judge based on an attachment to the Mar. 17, 1981, order which incorrectly informed interested parties that notices of appeal were to be filed in accordance with 43 CFR 4.291. This regulation had been deleted. See 46 FR 7335 (Jan. 23, 1981). The regulation in effect when the appeal was filed, 43 CFR 4.320, provides that notices of appeal are to be filed with the Board of Indian Appeals. In view of the fact that appellee did receive actual notice of the appeal, this mistake constitutes harmless error.

appellant filed a formal appeal, entitled "petition for reopening" with judge Burrowes. 2/ This petition sought review of the denial of reopening on the question whether decedent and appellee were married. 3/ On appeal, appellant offers affidavits and other documentary evidence, which she intends to present at any evidentiary hearing, indicating that decedent and appellee may not have been married.

Appellee opposes this appeal principally on the grounds that the Board lacks jurisdiction because appellant failed to serve him with a copy of the notice of appeal. In support of his contention that service upon all interested parties is a jurisdictional prerequisite, appellee cites Estate of Grace First Eagle Tolbert (Talbert), 1 IBIA 209, 79 I.D. 13 (1972). In that case the Board construed section 4.291(b) of its former regulations, 36 FR 7185, 7199 (Apr. 15, 1971). That regulation stated in pertinent part:

> It is a jurisdictional requirement that, at the time of filing the original notice [of appeal], [the appellant] shall forward copies of the notice of appeal by regular mail or otherwise to all Superintendents named on the Examiner's notice of decision, to all parties who share in the estate under the decision being appealed, and to all other parties who have appeared of record.

[1] Although appellee notes that "the former regulations were more stringent regarding service" (Appellate Memorandum at 3-4), he fails to note

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2/ Appellee contends that these various documents were mischaracterized by appellant, the several Administrative Law Judges, and the Board to his detriment. Although appellee may have experienced some initial confusion about what appellant was seeking, that confusion has been removed and appellee has been afforded an opportunity to respond to appellant's contentions.
3/ No appeal has been taken from the finding that appellant is decedent's daughter and entitled to share in her estate. This finding is affirmed.

that section 4.291(b) had been amended to delete the phrase "[i]t is a jurisdictional requirement that" 4/ and that 43 CFR 4.320 (1981) was the regulation in effect at the time the March 17, 1981, order in this case was issued. Under the current regulations, the Board is not deprived of jurisdiction by the failure of the appellant to serve interested parties with a copy of the notice of appeal. 5/

[2] Appellee also contends that appellant has attempted to present evidence on appeal that is not part of the record. Appellant is seeking reopening of the estate. Since reopening was denied by the Administrative Law Judge, she presented to the Board on appeal the evidence that she would attempt to prove in an evidentiary hearing. This evidence was supported by affidavits and other documents. This is precisely the procedure envisioned in the regulations in 43 CFR 4.242, which deal with reopening of estates. See Estate of Mary Martin Mataes Andrew Caye, 9 IBIA 196 (1982).

[3] Appellee argues that because the evidence taken at the original probate hearing supports the 1957 decision, no contradictory evidence can be heard. 6/ Reopening, however, is granted for the purpose of preventing a miscarriage of justice based on a showing that the evidence presented at the original hearing was incorrect, incomplete, or otherwise inadequate. Appellant has made a sufficient showing that the evidence upon which the 1957 decision was based may not have been correct. Under the regulations of the

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4/ 36 FR 24813, 24814 (Dec. 23, 1971).
5/ Failure of service would, of course, be considered in establishing a briefing schedule in a particular case.
6/ Appellee's citation of Estate of Asmakt Yumpquitat (Millie Sampson), 8 IBIA 1 (1980), is inappropriate. In that case the Board held merely that a decision of an Administrative Law Judge based on demeanor evidence would not be disturbed.

Department of the Interior she is entitled to an opportunity to prove her position.

Appellee suggests that this estate has been closed too long to reopen. The Department's regulations permit reopening any estate, regardless how long it has been closed. Prudential considerations must enter into the determination of whether finality should be accorded to old decisions. In this case the record before the Board indicates that decedent's estate remains intact and within the jurisdiction and control of the Department. At the time of the original order of January 31, 1957, appellant was 2 years old. Furthermore, appellant was adopted by non-Indians on March 4, 1957, and learned of the existence of her mother's trust estate on the Fort Peck Reservation only shortly before instituting this action. The regulations at 43 CFR 4.242 require that in order to reopen estates closed for more than 3 years, "manifest injustice" be shown. The Board has held that "manifest injustice" means plain error. See Estate of Snipe, 9 IBIA 20 (1981). It appears to the Board that appellant has made a sufficient showing to require a complete review of the determination of inheritance made in decedent's estate on January 31, 1957, despite the age of that decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, that portion of the March 17, 1981, order which found that Patricia First McBride is the daughter of Wilma Florence First Youngman is affirmed. That portion of the order which denied rehearing on the question of whether Warren C. Youngman was the surviving spouse of Wilma Florence First Youngman is reversed and the case

is remanded to the Hearings Division for an evidentiary hearing and decision on this issue.

Franklin D. Arness
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Jerry Muskrat
Administrative Judge